IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-390

EDIGIO CERILLI,
RALPH BUFFONE,
MAYLAN YACKOVICH,
JOHN SHURINA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOHN ROGERS CARROLL,
Suite 326,
Three Penn Center Plaza,
Philadelphia, Pennsylvania 19102
Counsel for Petitioners.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-5711

TABLE OF CONTENTS.

TABLE OF CITATIONS.

Cases: **Page**

Statutes:

IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1977.

—

No. .

—

EDIGIO CERILLI,
RALPH BUFFONE,
MAYLAN YACKOVICH,
JOHN SHURINA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

—

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 15, 1977.

CITATION TO OPINIONS BELOW.

The Opinion of the District Court for the Western District of Pennsylvania is printed in Appendix B hereto and is reported at 428 F. Supp. 801 (W. D. Pa. 1977). The Opinion of the Court of Appeals for the Third Circuit is not yet officially reported but is printed in Appendix A hereto.

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix A hereto, was made and entered on July 15, 1977. A Petition for Rehearing en banc was timely filed and denied by the Court of Appeals on August 12, 1977. A copy of that Order is appended hereto marked Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

THE QUESTIONS PRESENTED.

1. Is a District Court Order denying a Motion to Dismiss on the ground of pre-trial prosecutorial misconduct of a kind for which dismissal is alleged to be the appropriate remedy, a final order subject to pre-trial appellate review in the Court of Appeals under § 1291 of the Judicial Code?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Constitutional provision involved is the Due Process Clause of the Fifth Amendment. The Statute involved is 28 U. S. C. A. § 1291 which provides as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655; § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

STATEMENT OF THE CASE.

Three (3) of the four (4) petitioners herein were tried to a consentual mistrial on an Indictment found in the Western District of Pennsylvania on February 25, 1976. The mistrial was declared May 18, 1976 and the operative events concerned in the present matter occurred thereafter.

Three (3) days after the mistrial the United States Attorney for the Western District of Pennsylvania filed a "Motion to Reconvene and Pole the Jury". This Motion was simultaneously made public and given to the press and contained completely baseless allegations that the jury had agreed on a verdict before the mistrial and implied misconduct in connection with the mistrial. There ensued a drum fire of public statements by the United States Attorney culminating in a superseding Indictment, the subject of instant Motion to Dismiss, which was filed on August 5, 1976. The actions of the United States Attorney in this connection between the time of mistrial and the time of the Motion for Dismissal were described by the trial Judge as "ethically and legally uncalled for and unwarranted. . . . Such action by a powerful officer such as the United States Attorney was prejudicial and must be condemned so that it may not be repeated." (168A of Record printed for Court of Appeals). See Appendix B *infra*.

The District Court denied defendant's Motion on the ground that remedies alternative to dismissal would suffice. On appeal to the Court of Appeals for the Third Circuit defendants argued that the issue of pre-trial misconduct was reviewable under this Court's decision in *Abney v. United States, infra*. That Court while agreeing that a double jeopardy issue also raised by the three (3) previously tried defendants-appellants was reviewable under *Abney* held that it was powerless jurisdictionally to con-

sider the refusal of the Motion to Dismiss for prosecutorial misconduct under § 1291.

The Court of Appeals read this Court's decision in *Abney* denying jurisdiction of an appellate Court to pass on the sufficiency of an Indictment as preventing consideration on pre-trial appeal of any issue other than double jeopardy. Relying on this Court's decision that sufficiency of an Indictment was only reviewable following an adverse decision on trial the Court held:

> Such reasoning is equally applicable to the "misconduct" and "limitations" questions that the defendants assert here. For both of these issues may be effectively reviewed should a final judgment adverse to the defendants result. Consequently, they do not fall within the ambit of the "collateral order" doctrine.
>
> With respect to the prosecutorial misconduct problem, in particular, we note that the district judge has reserved decision on the requested change of venue. It may be that the trial court will authorize a change in venue in order to insulate the defendants from any prejudicial publicity, prosecutorially induced or otherwise. Or the judge may adopt protective mechanisms in his own courtroom that will suitably protect the defendants as well.

On Petition for Rehearing the appellants in that Court presented the question as follows: "The issue presented by this Petition is this Court's jurisdiction to review on pretrial appeal the denial of defendants' Motion to Dismiss a superseding Indictment where the ground of a Motion is prosecutorial misconduct . . . More specifically the question presented is whether such Motion and its denial are clearly collateral and unrelated to the issue of guilt and the remedy urged upon the Court is to preclude trial altogether on such Indictment." Rehearing was denied as stated on August 12. This Petition followed.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals faced the issue of its jurisdiction under 28 U. S. C. A. § 1291 in the context of this Court's then recent decisions in *Abney v. United States*, – U. S. –, 52 L. Ed. 2d 651, 97 S. Ct. – (6/9/77), and *Lee v. United States*, – U. S. –, 53 L. Ed. 2d 80, 97 S. Ct. – (June 13, 1977). The Third Circuit held those decisions limited its jurisdiction on pre-trial appeal to the double jeopardy issue presented in the original appeal of the three (3) previously tried petitioners in this case. Petitioners urged in the Court of Appeals that *Abney* and *Lee* do not so limit its jurisdiction and that properly read, they interpret § 1291 to permit pre-trial review of collateral issues whose resolution favorable to a criminal defendant may include the preclusion of trial as a permissible remedy.

The Court of Appeals entertained no doubt that the issue presented was collateral to the issue of innocence or guilt within the meaning of *Abney* and *Cohen v. Beneficial Industrial Loan Corporation*, 337 U. S. 541. There is and was no doubt in the record below that these petitioners made "no challenge whatsoever to the merits of the charge against them" nor did they seek suppression of the government's intended evidence. Rather, they were in this Court's words contesting the very authority of the government to hail them into Court to face trial on the charge against them.

Unlike the issue of the sufficiency of the Indictment in *Abney*, these petitioners contend that no matter what the form or content of the Indictment they were not amenable to trial on these charges because of the prosecution's misconduct. For this substantive proposition they relied upon this Court's decision in *Menna v. New York*,

423 U. S. 61; *Blackledge v. Perry,* 417 U. S. 21 and *Robinson v. Neil,* 409 U. S. 505. Apart from the collateral quality of the issue presented, these petitioners further argued in the Court of Appeals that the issue was reviewable because it involved a right whose vindication may include the complete prevention of trial.

This Court had held in *Abney* that the double jeopardy policy to preclude exposure of an accused to reprosecution was one whose vindication required pre-trial review. Inasmuch as the District Court with more than adequate foundation in the record characterized the prosecutor's misconduct as unmistakably deliberate and calculated and as involving arrogation to himself of the powers of judgment of a superior Judge (District Court Opinion page 165a; Appendix B *infra*), it was at least arguable that a permissible remedy was the prevention or prohibition of trial.

On this basis these petitioners asserted in the Court below and now claim that their case is within that class of cases invoking a policy whose vindication may involve prevention of trial and therefore subject to pre-trial review under *Abney* and *Lee, supra.*

In *Abney,* this Court cites with approval the Eighth Circuit decision in *United States v. Barkett,* 530 F. 2d 181, *Cert. Denied,* – U. S. – (1976) holding a collateral estoppel claim to be an appropriate subject of pre-trial review under § 1291. The Fourth Circuit, in *United States v. MacDonald,* 551 F. 2d 196 (4 Cir. 1976), *Cert. Granted,* – U. S. – (June 20, 1977; No. 75-1892), held an Order refusing to dismiss on speedy trial grounds a proper subject of pre-trial review because of the implications of the Speedy Trial policy. Prosecutorial misconduct has been similarly so regarded. See, *U. S. v. DiMarco,* 401 F. Supp. 505 (D. C. Cal. 1975).

Petitioners also urged upon the Court of Appeals that this Court's decision in *Lee v. United States, supra,* makes plain that in the double jeopardy context a mistrial brought about by misconduct of the prosecution involving bad faith or harrassment, will preclude retrial even though the mistrial is requested by a defendant. It seems consistent with that doctrine to say that prosecutorial misconduct occurring pre-trial but having the same characteristics and effect as the conduct mentioned in *Lee* would call for the invocation of a remedy barring trial.

Finally, we observe that it makes no difference for appealability purposes, of course, whether these appellants win or lose on the merits. The issue urged by petitioners here is only that the rights they assert are reviewable pretrial and the Order denying them is final within the meaning of *Abney* and § 1291. We respectfully suggest that this Order fits the criteria of a collateral Order as described by Professor Moore, quoted in *Barkett, supra,* namely, that it is separable from rights asserted in the action itself, too important to be denied review in the sense that it presents a serious and unsettled question and that review, when it comes, will be too late to be effective. Needless to say, the assertive right not to be tried cannot be effectively reviewed post trial.

CONCLUSION.

For the foregoing reasons petitioners respectfully request that a Writ of Certiorari be granted directed to the Court of Appeals for the Third Circuit for review of the instant decision.

JOHN ROGERS CARROLL,
Attorney for Petitioners.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1200

UNITED STATES OF AMERICA

v.

CERILLI, EDIGIO
BUFFONE, RALPH
YACKOVICH, MAYLAN
SHURINA, JOHN,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Crim. Nos. 76-22-1, 2, 3 & 4

Submitted Under Third Circuit Rule 12(6)
June 17, 1977

Before: VAN DUSEN, ADAMS and GIBBONS, *Circuit Judges*

BLAIR A. GRIFFITH
U. S. Attorney
DANIEL H. SHAPIRA
Asst. U. S. Attorney
JAMES J. WEST
Asst. U. S. Attorney
Pittsburgh, Pa. 15219

Attorneys for Appellee

THOMAS R. CERASO
IRVING M. GREEN
DOMINIC CIARIMBOLI,
Greensburg, Pa. 15601

Attorneys for Appellants

Opinion of the Court

(Filed July 15, 1977)

PER CURIAM:

This is an appeal primarily arising out of the declaration of a mistrial in a criminal proceeding. The defendants proffer three issues for our consideration: whether the issuance of a second indictment against the defendants violates the Double Jeopardy Clause; whether the prosecution engaged in misconduct which precludes the possibility of a fair trial; and whether a trial under the second indictment is barred by the statute of limitations. However, as a threshold matter, we must first decide whether this Court has jurisdiction, at the present time, to consider any of the points pressed by the defendants.

I.

On February 25, 1976, defendants Cerilli, Buffone and Yackovich were indicted for conspiracy and substantive violations of the Hobbs Act. All three men are high-ranking officials of the Pennsylvania Turnpike Commission, and it is alleged that they had demanded and obtained money from persons who leased equipment to the Commonwealth by the wrongful use of fear and under color of official right.

A trial commenced in late April of 1976 and took place over a three-week period. On May 17, 1976, the district judge charged the jury, and the deliberations then were initiated. Shortly thereafter, the judge was informed that one of the jurors had taken ill. Such juror was examined first by a nurse and then by a physician at a nearby hospital emergency room. The district court consulted with the medical personnel, and the juror then was hospitalized.

As a result of this development, the trial judge gave defense counsel the choice of proceeding with eleven jurors or moving for a mistrial. Also, the defense attorneys were asked if they would stipulate that the ill juror could rejoin his colleagues if and when he sufficiently recovered. But the defendants and their attorneys opted for a mistrial.

Immediately prior to and following the declaration of the mistrial, the proceedings received extensive press coverage in Pittsburgh and throughout Pennsylvania. Interviews were conducted with many of the principals in the case, including an interview with one Assistant United States Attorney who voiced his disappointment in the mistrial and who indicated that the case would be retried.

On May 21, 1976, the government filed a motion to reconvene and poll the jury, claiming that "prior to the separation of the ill juror, the jury had unanimously agreed on a verdict as to several counts of the indictment." Such motion was asserted in anticipation that partial verdicts might be entered. On May 25, however, the trial court denied the motion to reconvene and poll the jury. The press reported, in considerable depth, the events surrounding the motion to reconvene.

Not content to leave all post-trial maneuvering to the government, the defendants presented a motion for a judgment of acquittal on May 24 and, in July of 1976, also moved to dismiss the indictment or at least to secure a change of venue because of the extensive publicity that had been accorded the proceedings.

A "superseding" indictment was filed, on August 5, 1976, which named a new defendant (Shurina) and listed six additional substantive counts. One admitted purpose of this second indictment was to counter court rulings in the original trial that had excluded evidence of similar acts of alleged corruption on the part of the defendants,

acts which the government had desired to introduce on issues such as motive, intent and preparation. In the view of the district judge, such similar acts should have been set forth in the initial indictment, and he was unwilling to permit a constructive amendment of the indictment by admitting such evidence.

The defendants' request for acquittal was denied on August 13. But, on August 24, the defendants filed another motion to dismiss the charges against them or to obtain a change in venue. The motion to dismiss rested, in part, on the premise that any proceedings based on the superseding indictment would impermissibly expose the defendants to double jeopardy. On January 25, 1977, and after a hearing, the dismissal motion was rejected by the district judge. However, he reserved decision respecting the venue issue until the *voir dire* for the retrial was completed.

On February 2, 1977, the defendants filed an appeal from the denial of their motion to dismiss. At that juncture, the government moved to quash the appeal on grounds that there was no final appealable order. Such motion and the case as a whole were referred to this panel for disposition.

II.

Our first responsibility is to decide whether the denial of the defendants' motion to dismiss the indictment on double jeopardy grounds constitutes a "final decision" within the meaning of 28 U. S. C. § 1291 so as to be immediately appealable.

This jurisdictional issue recently was decided by the Supreme Court in *Abney v. United States*.[1] In that case, in which the defendants challenged a retrial on double jeopardy grounds, the Court ruled that an order rejecting

1. — U. S. —, 45 U. S. L. W. 4594 (June 9, 1977).

a motion to dismiss an indictment was a final decision for purposes of § 1291 and, therefore, was appealable.

The reasoning underlying the *Abney* decision is twofold: First, the denial of a dismissal motion against double jeopardy claims falls within the "collateral order" exception to the final judgment rule.[2] This is so since such an order constitutes a complete, formal and final rejection of an accused's double jeopardy arguments, the very nature of which are collateral to and separable from the fundamental issue of guilt or innocence. Second, to postpone appellate review of double jeopardy claims until after conviction and sentencing would, the *Abney* Court declared, undermine the rights conferred on an accused by the Double Jeopardy Clause, as that Clause not only insulates an individual from double punishment but also protects him from being twice put to trial for the same offense.

In view of *Abney*, then, the denial of the dismissal motion in the present context, at least insofar as it concerns the defendants' double jeopardy assertions, constitutes a final decision appealable under § 1291.

III.

Even if the defendants' jeopardy claims are now reviewable, it does not follow that their other contentions, relating to prosecutorial misconduct and the statute of limitations, are also appealable at this time.

2. *See* Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949).

The "collateral order" exception to the final judgment rule encompasses:

> "that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Id. at 546.

In *Abney*, the petitioners had appended another question to their double jeopardy arguments—specifically, a challenge to the sufficiency of the indictment. Nevertheless, the Supreme Court ruled that § 1291 did not confer jurisdiction on an appellate court to pass on the "sufficiency" issue, postulating that the district court's refusal to dismiss the indictment because of that secondary problem was not "collateral" in nature but rather went to the heart of matters to be resolved at the imminent trial. The *Abney* Court also posited that the sufficiency of the indictment could be reviewed effectively and, if necessary, corrected if and when a final judgment resulted.

Such reasoning is equally applicable to the "misconduct" and "limitations" questions that the defendants assert here. For both of these issues may be effectively reviewed should a final judgment adverse to the defendants result. Consequently, they do not fall within the ambit of the "collateral order" doctrine.

With respect to the prosecutorial misconduct problem, in particular, we note that the district judge has reserved decision on the requested change of venue. It may be that the trial court will authorize a change in venue in order to insulate the defendants from any prejudicial publicity, prosecutorially induced or otherwise. Or the judge may adopt protective mechanisms in his own courtroom that will suitably protect the defendants as well.

In sum, the only claim that would appear to be reviewable at this time is that pertaining to the alleged violation of the Double Jeopardy Clause.

IV.

We now turn to a brief consideration of the question whether the Double Jeopardy Clause would be violated should proceedings pursuant to the second indictment be permitted to continue.

Although it is difficult to discern their precise contentions, the defendants, in effect, maintain that, since the original indictment has not yet been formally dismissed, and because jeopardy had attached in the proceedings under that indictment, any prosecution under the subsequent indictment would expose them to double jeopardy.[3] We cannot, however, adopt the position advanced by the defendants.

The Supreme Court's recent opinion in *Lee v. United States*,[4] while not squarely on point, cogently encapsulates double jeopardy precepts which bear on the present inquiry. In *Lee*, decided by an 8-1 majority, the Court reiterated the fundamental rule that "[w]here the defendant, by requesting a mistrial, exercised his choice in favor of terminating the trial, the Double Jeopardy Clause generally [will] not stand in the way of reprosecution. Only if the underlying error was 'motivated by bad faith or undertaken to harass or prejudice' [will] there be any barrier to retrial. . . ."[5] Put another way, double jeopardy poses no obstacle to a subsequent reprosecution where the prior "proceedings were terminated at the defendant's request and with his consent."[6]

3. Alternatively, the defendants appear to contend that the issuance of the "superseding" indictment necessarily constitutes a dismissal of the original indictment. Continuing this line of reasoning, they claim that, because jeopardy attached under the first indictment, and as the first indictment has, in effect, been dismissed, no prosecution is possible under the second indictment or, presumably, under any other one.

The defendants' argument in this regard is not convincing, especially in the absence of any authority for such a theory. As we understand it, there are two pending indictments against the defendants, and the government may select one of them with which to proceed to trial. *See* cases cited in note 8 and accompanying text *infra*.

4. — U. S. —, 45 U. S. L. W. 4661 (June 13, 1977).

5. *Id.* at 4663.

6. *Id.*

In the case at bar, it is clear that the defendants exercised their choice to seek a mistrial. They decided upon such a termination of their trial when the juror became ill during the course of deliberations. In light of the precepts articulated in *Lee* and its predecessors,[7] such consent removes any barrier to a reprosecution, whether under the original indictment or under a new one.

Where a mistrial is predicated on prosecutorial bad faith or overreaching, as noted in *Lee*, a reprosecution, of course, may be prohibited. Here, however, there are no allegations or suggestions that the declaration of a mistrial rested upon prosecutorial misconduct. Rather, it is manifest that the basis for the mistrial was the illness of a juror, a factor outside the control of the parties to the proceeding. Although there are claims that the prosecution has engaged in various improprieties, the fact remains that the underlying source of the mistrial was not tainted by any overreaching, prosecutorial or otherwise.

We recognize that this case is somewhat unusual because there are two outstanding indictments. Ordinarily, the prosecution would proceed under the original indictment, if it retains vitality, or else would secure another indictment. Nonetheless, it has long been settled that the Double Jeopardy Clause is not abridged where there are two pending indictments, setting forth largely identical charges, against the same defendants.[8] Only where the government attempts to proceed to trial on both indictments does the double jeopardy protection come into play.

7. *See, e.g.*, United States v. Dinitz, 424 U. S. 600 (1976).

8. *See, e.g.*, United States v. White, 524 F. 2d 1249 (5th Cir. 1975); United States v. Ragano, 520 F. 2d 1191 (5th Cir. 1975); U. S. v. Bowles, 183 F. Supp. 237 (D. Me. 1958); and authorities cited therein. *See also* De Marrias v. United States, 487 F. 2d 19 (8th Cir. 1973); United States v. Wilsey, 458 F. 2d 11 (9th Cir. 1972); and United States v. Garcia, 412 F. 2d 999 (10th Cir. 1969).

In the present context, however, there is no indication that the prosecution plans to move against the defendants on both indictments. Accordingly, the Double Jeopardy Clause does not preclude further proceedings against the defendants, even under the "superseding" indictment that has been returned against them.

V.

The order of the district court denying the motion to dismiss the indictment on double jeopardy grounds will be affirmed. In all other respects, the appeal will be dismissed for lack of jurisdiction.

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal Action No. 76-22

UNITED STATES OF AMERICA

v.

EGIDIO CERILLI,
RALPH BUFFONE,
MAYLAN YACKOVICH and
JOHN SHURINA

Opinion

ROSENBERG, *District Judge*

The matters now before me are on two motions, (1) a Motion To Dismiss Indictment filed July 23, 1976 against the defendants, Egidio Cerilli, Ralph Buffone and Maylan Yakovich; and (2) a Motion To Dismiss Indictment filed August 24, 1976 against the defendants, Egidio Cerilli, Ralph Buffone, Maylan Yackovich and John Shurina, or in the alternative for change of venue.

The original three defendants, Cerilli, Buffone and Yakovich were charged in the first ten-count indictment for violation of the Hobbs Act, 18 U. S. C. § 1951 and were tried to a jury during a period of three weeks, commencing on April 27, 1976. After counsel summations and a two hour charge on instructions to the jury and after the alternate jurors were excused, the jury were locked up for deliberation shortly after noon. In the evening the jury was sent to dinner and after dinner some of the jurors revealed to the bailiffs that they had become disturbed during the afternoon by the noticeably unusual condition of one of their members. The bailiffs at approximately 8:00 p.m. were informed, and in turn informed the court who also in turn informed counsel, that this particular member of the jury was ill.

The processing of the ill juror from 8:00 p.m. that evening at 8:00 p.m. I invited, with the consent of counsel, the United States Post Office nurse who examined the juror and found him to be in a highly nervous state with a blood pressure of 170/110. She declared that she was not permitted and would not administer drugs to the patient (other than tylenol) without a doctor's prescription and that this man needed a doctor. He asserted that he had no doctor. At 10:00 p.m., while the jury was still sequestered, and with the consent of counsel, I requested the same United States Post Office nurse to look at the juror again, before sending the jury to the hotel for the night. On this occasion I, with the approval of counsel, was present with the bailiffs who were previously present in the courtroom, with the door of my chambers and the door to the jury room open. All counsel with the court reporter were gathered in my chambers. The nurse then found the juror's blood pressure to be 175/112. She again emphatically declared that the juror was in need of a doctor and that she would not and could not prescribe for this man who was then in a worse nervous state than he had been at 8 o'clock.

I then questioned the juror, in the presence of the nurse and the bailiffs, and he advised that he had no doctor. All of this was reported to the assembled counsel and made a matter of record. Eventually, I believe it was on

the suggestion of counsel for the prosecution to the United States Marshal, that the juror be sent to the nearby Central Medical Pavilion Hospital emergency room, because the Marshal had already contacted these authorities for a doctor to be sent to the court. The answer by the hospital representative was that the juror would have to be sent to the hospital because equipment and staff would be needed for testing; however, the hospital emergency crew would receive and report on the juror immediately, if he were brought to the hospital. All counsel agreed that he be sent to the hospital and this was done. All counsel, the defendants and the reporter waited in my chambers for the report from the doctor. That came shortly before 1 o'clock a.m. over the phone. With the consent of all counsel present, I repeated the doctor's statements as he gave them to me, after I had assured him that his confidentiality would be protected, since in this instance it would serve the just processing of the case. All of this is a matter of record *en camera* and I shall not give the more confidential details because of any possible reflections on any person.

In any event, after tests were made at the hospital by the doctor and his staff with their equipment, the doctor advised me, and I in turn repeated it to all those present in my chambers, that it urgent that the juror be admitted to the hospital at once for a specific reason. I repeated the reason aloud to counsel and made it a part of the record. Particularly, the doctor stated, that it would be hazardous to send this one juror out with the other eleven for the night. All this, I say, was divulged to counsel and made a part of the record *en camera*. After the juror was admitted to the hospital, the eleven other jurors were sent to a motel for the night.

Thereupon the three counsel for the defendants refusing to proceed with eleven jurors moved for a mistrial, without any objection on the part of the prosecuting attorney. Orally I granted the motion, as reported on the record sometime after midnight, but I requested defense counsel to renew their motion on the next day in open court.

On the next morning the Assistant United States Attorney, without notice to opposing counsel, came to me in chambers and told me that he had relented on his approval the night before and desired a re-examination by another doctor. In any event, after giving the matter due consideration and consultation with the Chief Judge, I denied the request. Orally, he suggested that I await the release of the ailing juror from the hospital and reunite them for further deliberation. I denied the suggestion as well, and later in open court granted the defendants' motion of a mistrial. In the meantime and without my knowledge, the prosecuting attorney instructed one of the bailiffs, who had left the juror in the hospital on the night before, to return to the hospital in the morning and stand watch over the juror. This bailiff remained with the juror until 4:00 p.m. When the deputy marshal informed me of the Assistant United States Attorney's action, I instructed the marshal that when a case is in process neither the prosecution nor the defense counsel has any right to direct the marshal as to what he is to do with jurors, but such instructions must come from the trial judge. Accordingly, the bailiff left the hospital at 4:00 o'clock p.m.

On the next day the marshal and the bailiff in attendance at the hospital reported to me that on the previous day while the bailiff was yet at the hospital watching the ailing juror, the hospital's daytime doctor came on the floor at about 3:00 o'clock p.m. and looked at the ailing juror with the remark that he had seen this patient before under similar circumstances. I thereafter summoned the jury commissioner with the file on this particular juror and learned that the juror's answers to the jury commissioner

on information forms were similar to those given to the nurse—that he had no doctor and that he had no attorney.

A day later one of the highly prominent and fundamentally reliable newspapers in the city carried the story of its federal court reporter that I had excused the juror without having consulted with his "family doctor". This was an absolute falsehood and one I am certain that this highly reputable newspaper would never have published had it not gotten that information from what it would call a reliable source. I have attempted to fathom what that source might have been and cannot be persuaded that it could have been from the hospital nor the juror's private personal doctor, since he had none.

Some circumstantial persuasion might exist in what followed. When I denied the oral motion of the prosecuting trial counsel to hold the eleven jurors in abeyance until such time as the one being treated at the Central Medical Pavilion Hospital was released and to reunite them and direct them to resume deliberation as if no separation had occurred, the matter was publicized (by someone) and that evening the United States Attorney himself, as I observed him, appeared on television news broadcast and criticized me, and set himself up as the superior judge by stating that I was obliged to reunite the twelve separated jurors and cause them to continue to deliberate. From then on my staff was bombarded by news representatives for my reply, but of course, as a federal judge I could not and would not reply.

For a day or two the publicity subsided. Then on the following Friday morning, May 21, 1976, at 10:42 a.m., the prosecution filed a Motion To Reconvene and Poll The Jury. In the motion, the averment was that "the United States Attorney for this District *has reason to believe* that prior to the declaration of a mistrial at 12:30 A. M. on May 18, 1976, and prior to the separation of the ill juror, the

jury had unanimously agreed on a verdict as to several counts of the indictment." (Emphasis added). The prosecution did not aver any facts as a basis by which the United States Attorney was induced to "believe" that he had "reason to believe" what he averred.

The motion also averred that the "Court had inherent power to recall the jury and determine whether or not they had reached a unanimous verdict . . ." A Certificate of Service was enclosed to the effect that a true and correct copy of the within motion "was served by mail on May 21, 1976 and orally transmitted by telephone to all counsel of record." Immediately thereafter my office staff was again bombarded by the communications media personnel on what and when my disposition of the motion would be. If that motion was filed for its sparse contents and in the manner in which it was done for the purpose of reawakening and procuring additional, but prosecution-sided publicity, it served the purpose as it appeared in the news media that afternoon.

At the same time it was obvious that if the prosecution really wanted speedy action on such a motion it could have easily notified all the defense counsel to come in at a particular time that day before the court when it would then present an emergency motion upon which I could have acted without delay. The very fact that the prosecution "served by mail" the motion on a Friday morning to the various defense counsel indicates essentially that it would take at least twenty-four hours for the mail to arrive from Pittsburgh into Westmoreland County, that is into Greensburg or New Kensington where defense counsel have their offices, and that this would be on a Saturday. Under our law, computing the days when answers are required to be filed, we exclude both Saturday and Sunday, and thus I would have concluded that the delivery of copies of the motion would ordinarily have come to de-

fense counsel on Monday morning. And so counsel should have had at least twenty-four hours to answer the motion. As it turned out an answer was filed by defense counsel on Tuesday afternoon.

However, I need not be concerned with that answer because on Tuesday, May 25th, at 11:15 a.m., I filed a Memorandum Opinion and denied the motion of the United States Attorney to reconvene and poll the jury. Therein I stated very briefly and cited authority that a jury's verdict does not become effective until it is presented in open court and until counsel have had the opportunity to poll the jurors. I cited as authority *United States v. Taylor*, 507 F. 2d 166, C. A. 5, 1975.

Three days had already elapsed when the motion was filed on Friday morning and all eleven jurors whom I had been asked to reconvene for their factual information had been separated and had gone their own ways. Under such circumstances the motion, too, would have been late. In any event, the United States Attorney cited no law to support him or to contradict any cited authority. Yet on that evening the United States Attorney, again, personally went before the public on a television broadcast, which I personally observed, and officially stated that I was wrong in denying his motion to reconvene and poll the eleven members of the jury, that he could not appeal my decision, but that he could mandamus me to compel me to change my decision, but would not do this and would rather speed up the trial.

Judge Garth in *United States of America v. DeRosa et al.*, — F. 2d — , C. A. 3, No. 76-1642, 76-1643, in an opinion filed January 11, 1977, at page 11 said:

"This Court has constantly and continuously emphasized that

> A United States Attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the United States and he must exercise that responsibility with the circumspection and dignity the occasion calls for.

United States v. LeFevre, 483 F. 2d 477, 478 (3d Cir. 1973)."

This publicity action by a United States Attorney between a halted first trial and the recommencement of the second trial in which he was and is the prosecutor was ethically and legally uncalled for and unwarranted. The United States Attorney in his powerful position and magnetically-drawing news media, knew very well that the appropriate place for him to try his case was before the court and not before the television public. He very well knew that I would not respond to his broadcasts or enter into public debate with him. His television demonstrations could not have been for the purpose of fairly convicting the three defendants in the courtroom before a jury of twelve, but could have been only for the purpose of convicting the trial judge *ex parte* before the court of public opinion and coercing a leaning towards the prosecution's side. Such action by a powerful officer such as is the United States Attorney was prejudicial and must be condemned so that it may not be repeated. This must not be misunderstood. I have always had, and will most likely continue to have, the highest regard for the United States Attorney as a trust-worthy gentleman of high principles. I attribute this incident only to inadvertent aberration which may occur to any human being.

However, it is necessary that the trial judge, even if critical of the action by counsel for one side or another,

as so often happen in cases, nevertheless, remain neutral, fair and applies the law justly. That was, is and will be my function. And while I set these matters out in detail, if is done to provide a background for the evaluation of the defendants' request for a change of venue and for the further purpose of indicating to the defendants that the trial judge was well aware of many of the occurrences concerning which they complained. Accordingly, judgment must here be made on the facts as they exist and as the law is applicable to them.

Since a second indictment was subsequently presented, which contained six charges encompassing the original ten counts against the three original defendants, while adding another defendant, John Shurina, with sixteen counts, without a motion having been made by the prosecution to dismiss the original indictment, the defendants also complain that they are in effect being exposed to double jeopardy. The question in the first instance then must present itself to the trial judge on whether the prosecution intends to proceed upon both indictments as they would then contain duplicate charges. If it acts on the first indictment, it will have abandoned the second indictment with the additional counts and additional defendant, John Shurina. If it acts on the second indictment, will the three original defendants be prejudiced?

The defendants also contend that the second indictment is premature because if the first indictment is dismissed those same counts in the second indictment would also fail; and in the event the first indictment is dismissed, certain counts on the face of the second indictment occurring prior to August 5, 1976, would be beyond the statute of limitations, including the amount of conspiracy as it applies to overt acts prior to the expiration of the permissible statute of limitations. Because these questions are based upon hypothesis and speculation, I am not required to consider them presently.

At the last argument on the motions, the defendants submitted two voluminous exhibits, stipulated to by the Government as authentic, of a large amount of news articles found in various newspapers throughout the Commonwealth of Pennsylvania concerning this case. These defendants' Exhibits A and B are an accumulation of news articles concerning the same matters circulated about the same time by the wire services or local reporters. I have thoroughly reviewed these two exhibits.

The complaint by the defendants here is that the public action of the prosecution, particularly the United States Attorney, was frivolous, without any substantiation either in fact or law, and that the assertions were so prejudicial to the defendants as to deprive them of their rights to a fair trial in this District Court. These defendants contend that the televised press conferences, particularly, and the information given to the press by the United States Attorney prejudiced their rights to such an extent as to make it impossible for them to receive an impartial trial unprejudiced by anything that the United States Attorney might have said or done as based upon the prosecution's overreaching and bad faith activities.

Most of the publicity, it will be seen, heightens the prosecutorial values as it lowers—and condemns as already convicted—the three individual defendants. The publicity was well spread, particularly throughout the 25 counties comprising the Western District of Pennsylvania as it comprises the jurisdiction from which this court's jurors are called and empanelled. It would be from these counties that persons for any retrial of these defendants must be summoned for jury service.

That all publicity did not leave some impact or bias or even conviction in the minds of some persons of this

District, may not be dismissed out of hand as being improbable because by our modern method of communication there can never be some likelihood of a recollected and even biased carryover which would in some manner be unfair in a trial of a defendant. Under such circumstances our courts have held that reason and judicial concern must be left to the trial judge to see to it that defendants receive an unbiased, fair and just trial.

Whether or not, as of the time when a retrial should be rescheduled, the jury wheel would produce any persons who would have become familiar with any of the circulated publicity as of the time before, during and following the first trial of these defendants is problematical. If such persons were to be summoned and they recalled anything of the publicity which might in any way be prejudicial to the defendants, such information would be available to the trial judge and counsel for the parties as of voir dire time and the defendants could then be properly protected. The fact that there had been wide publicity in this case, as in many other cases, is in itself no indication that a fair trial cannot be had. Probably no greater example of that has been shown than recently when the public was deluged by the publicity in the cases of *United States of America v. Patricia Hearst*, 412 F. Supp. 873 (D. C. Cal. 1976) and *United States of America v. Haldeman, et al.*, – F. 2d –, C. A. D. C. 1976. And even in those cases, their trials were eventually had.

It is quite true that a probable effect of any imprudence on the part of the United States Attorney did in some way prejudice the defendants' rights to a fair trial. The only question is to what extent, then, has it occurred? Considerable time has elapsed since the motion for a mistrial was granted. I have dutifully attempted to not only safeguard the defendants' fair trial but as well I have protected the government's right to re-try its case by requiring

the defendants to waive their rights under the Speedy Trial Act, 18 U. S. C. § 3161 et seq. The time delay has been of benefit to both sides, because the furor raised by the indiscreet and erroneous tactics of the prosecution have sufficiently died down. A better atmosphere will have been created by which a truly fair and proper voir dire may be had.

Directing myself specifically to the defendants' motions, I must base my decision on the law of the case. Any other basis for a decision would only result in futility. In any event, dismissal of the indictments is not the appropriate result upon a motion to dismiss based upon pretrial publicity, at least until a voir dire may be conducted. *United States v. Abbott Laboratories*, 505 F. 2d 565, C. A. 4, 1974; *United States v. Pfingst*, 477 F. 2d 177, C. A. 2, 1973; *United States v. Whiteside*, 391 F. Supp. 1385 (D. C. Del. 1975); *United States v. Archer*, 355 F. Supp. 981 (D. C. N. Y. 1972). These cases all dealt with prosecutorial misconduct of a sort.

In *United States v. Addonizio*, 313 F. Supp. 486 (D. C. Pa. 1970), aff'd. 451 F. 2d 49, C. A. 3, 1972, the District Court held that "Even, however, accepting that characterization of the pre-trial publicity herein, this court is not persuaded that the fact alone necessarily precludes the possibility of selecting a fair and impartial jury for the trial of the indictment. . . . See *Patriarca v. United States*, 402 F. 2d 314, C. A. 1, 1968, cert. den. 393 U. S. 1022 (1969); *United States v Corallo*, 281 F. Supp. 24 (D. C. N. Y. 1968)." (at page 493).

In *United States v. Haldeman, supra*, filed October 12, 1976, per curiam, the Court held at pages 26-27:

> "We have carefully reviewed the 'Watergate articles submitted by appellants, and we find that pretrial publicity in this case, although massive, was neither as inherently prejudicial nor as unforgettable as the spectacle of Rideau's dramatically staged and broad-

> cast confession. It is true that some pieces contained in the extensive collection of articles gathered by the appellants are hostile in tone and accusatory in content. The overwhelming bulk of the material submitted however, consists of straightforward, unemotional factual accounts of events and of progress of official and unofficial investigations. In short, unlike the situation faced by the Court in *Rideau*, we find in the publicity here no reason for concluding that the population of Washington, D. C. was so aroused against appellants and so unlikely to be able objectively to judge their guilt or innocence on the basis of the evidence presented at trial that their due process rights were violated by the District Court's refusal to grant a lengthy continuance or a change of venue prior to attempting selection of a jury."

This case is somewhat different in one respect from what the Court said in *United States v. Haldeman, supra*, at pages 26-27, in that the proportion of publicity might vary in our case from that in which the Court found was "straightforward, unemotional factual accounts of events and of progress of official and unofficial investigations." In tune with the current cases of this Circuit and others, it is at least more expedient to wait until a thorough voir dire before a motion to change venue should be entertained. Although not the best way, it is the judicially approved way.

While the defendants argue that a second indictment is premature, it is clearly true, nevertheless, that the government may have two or more indictments pending against a defendant on the same or related charges adding or subtracting pertinent counts. *United States v. Ragano*, 520 F. 2d 1191, C. A. 5, 1975; *DeMarrias v. United States*, 487 F. 2d 19, C. A. 8, 1973, cert. den. 415 U. S. 980 (1974); *United States v. Wilsey*, 458 F. 2d 11, C. A. 9,

1972; *United States v. Garcia*, 412 F. 2d 999, C. A. 10, 1969; *United States v. Bowles*, 183 F. Supp. 237 (D. C. Me. 1968). A second indictment in this case, at this time, is not premature especially when there is an outstanding motion on the first.

All counts in the first indictment occurred within the five year period required by law, the earliest count occurring in March 1971, while the indictment was returned February 25, 1976. The second indictment was returned in August 1976 and if the defense is arguing that Counts 5, 7, 8 and 9 are barred because they happened in April and May 1971, it is no basis for argument. The filing of an indictment tolls the statute of limitations and if a second indictment is filed prior to the dismissal of the first, the counts in the second are timely because the original statute was tolled by the first indictment. *United States v. Wilsey, supra; United States v. Garcia, supra; United States v. Feinberg*, 383 F. 2d 60, C. A. 2, 1967; *United States v. Powell*, 352 F. 2d 705, C. A. D. C.

Finally, as for the defendants' argument that overt acts charged in Count 1 would be beyond the statute of limitations, the statute does not begin to run on a conspiracy charge until the date of commission of the last overt act. *United States v. Johnson*, 165 F. 2d 42, C. A. 3, 1947, cert. den. 332 U. S. 852 (1948).

Accordingly, the defendants' motions to dismiss both indictments or in the alternative change of venue will be denied without prejudice.

To obviate any indication of bias or partiality on my part for either side or for any parties, and for the purpose of securing to the Government a fundamentally fair and impartial trial on the charges levelled against them in the indictments, I deem it feasible that I withdraw as the presiding judge in this case. I am therefore referring this action back to the Clerk of Court for reassignment to another judge for further disposition of the case.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal Action No. 76-22.

UNITED STATES OF AMERICA

v.

EGIDIO CERILLI,
RALPH BUFFONE,
MAYLAN YACKOVICH and,
JOHN SHURINA.

ORDER OF COURT.

AND NOW, TO-WIT, this 26th day of January 1977, the above entitled case is hereby referred back to the Clerk of Court for reassignment to another judge for further disposition of this case.

/s/ LOUIS ROSENBERG,
United States District Judge.

cc:
Daniel Shapiro, Assistant
United States Attorney
633 U. S. P. O. & Courthouse

Irving M. Green, Esq.
1092 Fifth Ave.
New Kensington, Pa. 15069

Dominic Ciarimboli, Esq.
101 North Main St.
Greensburg, Pa. 15601

Thomas R. Ceraso, Esq.
First National Bank Building
Greensburg, Penna. 15601

APPENDIX C.

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 77-1200

UNITED STATES OF AMERICA

v.

EDIGIO CERILLI, et al.,
Appellants

Sur Petition for Rehearing.

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ ARLIN M. ADAMS,
Circuit Judge

Dated: August 12, 1977